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Chairman: Mr. ALFONSO (Mozambique)

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AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10 and A/46/405)

1. Mr. VILLAGRAN KRAMER (Guatemala) said that the general rule of a State's immunity of jurisdiction with respect to the courts of other States had been undergoing changes not only because of economic, financial and trade factors but also for ideological reasons. Market forces required both freedom and equality between the public and private sectors. But, privatization, which was a positive phenomenon in itself, did not mean that States stood on an equal footing with private interests.

2. The effect of such factors was to reduce the scope of immunity and extend the jurisdiction of the State with respect to other States and their entities. A traditional rule advocated by his country, as witnessed by its support for the Calvo clause and the Drago clauses, was thus being inverted and therefore his delegation viewed the development with some apprehension. The developed countries were imposing their jurisdiction on the privileges of immunity in a trend which had taken on renewed vigour, first in the highly developed States, beginning with the European Economic Community, and then in a number of developing countries. The principle of reduced State immunity was thus gaining ground among the countries concerned with encouraging world trade.

3. It was necessary to determine the forum in which the report of the International Law Commission on the topic should be discussed. Although some delegations were proposing that it should be examined by a working group, the delegations of the developing countries, who viewed such a process with misgiving, believed it necessary to initiate a negotiation in which their views could be heard, and that could only be achieved by means of a diplomatic conference, the convening of which his delegation supported.

4. The Commission identified exceptions to the general rule which warranted consideration. However, doubts had emerged about article 10, which referred with respect to commercial transactions to the applicable rules of private international law. Such rules might invoke the lex loci celebrationis or the lex loci executionis, and if those laws established without doubt the inadmissibility of State immunity, the defendant State was necessarily subject to the court.

5. States and State entities or enterprises could chose the applicable law in the contract and thus choose the court to which they were subject as well. It was an important issue, for commercial contracts included international loans by private banks, and the experience of many developing countries in renegotiating such loans demonstrated that a contractual choice of court weakened the debtors' position in some cases, whereas in others it revived the sources of international financing.

(Mr. Villagran Kramer, Guatemala)

6. None of those issues could be negotiated in a working group in the same way as at an international conference. In its report the Commission explained in depth and with a wealth of detail the reasons for its proposals, but its arguments had to be viewed against the demands of economic reality. States dealt basically with private enterprises in highly developed countries which did not require any concessions from small countries. That was a further reason why Guatemala supported the convening of an international conference.

7. Mr. MOMTAZ (Islamic Republic of Iran) emphasized the practical importance of the draft articles on jurisdictional immunities of States and their property and the need for the international community to have a set of rules accepted by all States. It was impossible to cling to the old rule of the absolute immunity of States when they were playing an increasing role in international trade. That would impede the development of international trade, and his delegation therefore supported the general trend of limiting the immunity of States from the jurisdiction of the courts of other States with respect to commercial transactions. On the other hand, immunity with respect to acts performed in exercise of the prerogatives of State authority should remain untouched. State immunity would then be the general rule and a principle of international law, while the limitations on the rule would constitute exceptions. Such exceptions should be based on the practice of States, which had different political, socio-economic and legal systems and were at different stages of economic development.

8. Commenting more specifically on the draft articles which limited the jurisidictional immunity of States, he said that his delegation fully supported the idea put forward in the commentary to article 5 that "any immunity or exception to immunity accorded under the present articles would have no effect on general international law and would not prejudice the future development of State practice".

9. With respect to part III of the draft articles, concerning proceedings in which State immunity could not be invoked, his delegation supported in general terms the distinctions made by the Commission between activities to which State immunity applied and activities to which it did not; the most important distinction was the one between acta jure imperii and acta jure gestionis. Commercial transactions belonged in the second category, but unfortunately draft article 10 proposed no plausible criterion for determining what was meant by commercial transactions. It was not much help simply to refer to the applicable rules of private international law, for they lacked precision and uniformity. His delegation agreed to the proposal to invoke in that respect a rule based on the jurisdictional link between the commercial contract and the forum State.

10. The exception to State immunity contained in draft article 11, concerning contracts of employment, was unjustified. Neither the number nor the importance of the disputes which might arise between local employees and

(Mr. Momtaz, Islamic Republic of Iran)

diplomatic and consular missions justified an exception to the immunity which diplomatic law accorded to the accrediting State.

11. Draft article 12 gave rise to similar difficulties. Protection of victims could be effectively provided by requiring diplomatic missions or foreign representations to take out insurance or by encouraging them to resolve the dispute amicably. The right of recourse to the courts was not necessarily the only means of protecting the rights of individuals.

12. With regard to draft article 14, his delegation had doubts about the need to include a provision on intellectual and industrial property, for two reasons. Firstly, because the obligations of States in that area were already dealt with in some respects by the Universal Copyright Convention revised in Paris in 1971. Secondly, because the scope of the draft article was extremely broad and sought to cover the whole range of types of intellectual and industrial property.

13. His delegation welcomed the Commission's decision to recommend that the General Assembly should convene an international conference of plenipotentiaries to examine the draft articles on immunities and conclude a convention on the topic. The settlement of disputes could be dealt with in an optional protocol. The importance of the question justified a proposal by the Committee to the General Assembly for the establishment of a committee of legal experts nominated by States for the purpose of drafting a set of articles on the topic for submission to the conference of plenipotentiaries.

14. Mr. GOLDENSTOCK (United States of America) said that until the middle of the present century State practice had, in general, recognized the virtually absolute jurisdictional immunity of States and their property, but a distinction had subsequently begun to be made between the sovereign capacity of a State and its capacity as another entity competing in the marketplace for goods and services, restricting immunity in the latter case but not in the former. Although in certain respects the draft articles were in full accord with contemporary thinking on the question, in other respects they continued to respect the theory of absolute immunity. It had been argued that such resistance to change represented an effort to provide safeguards for countries seeking to promote economic development and, in that context, the comments of the representative of Poland urging the restrictive approach as the one most conducive to economic development were particularly discerning and constructive.

15. He was gratified that the inapplicability of immunity for "commercial contracts" had been broadened to include all "commercial transactions", as that definition was more consistent with modern international business practice. There were, however, several aspects of the treatment of the issue which raised concerns. Of prime concern was that, in stipulating that the nature of the activity was determinative in analysing whether a particular activity was commercial, the draft articles had up to a point adopted the

(Mr. Goldenstock, United States)

distinction implicit in contemporary practice so that immunity would not apply even if the State had entered into the commercial activity in support of a governmental purpose. Otherwise, it could be argued that there was no commercial activity for which a State was not immune. However, the draft articles provided a contradictory test requiring that the purpose of the activity be taken into account if the purpose of the activity was in some way relevant to determining the character of the transaction. That test was inconsistent with the nature-purpose distinction and would deprive parties of the ability to seek legal redress against a State which had not complied with its obligations under contracts for the purchase of goods and services.

16. The provision contained in article 10, paragraph 3, risked establishing a significant and unwarranted limitation on the ability of private parties to obtain jurisdiction over a State which had created a separate State-controlled commercial entity and had under-capitalized the entity or subsequently taken action to render it insolvent. State practice recognized that State commercial instrumentalities were separate juridical entities for the purpose of suit. Nevertheless United States courts permitted the claimant to sue the State itself in exceptional circumstances where the parent State had deliberately evaded commercial liability by artificially withholding or withdrawing capital from its commercial entity. In the view of his delegation, the draft articles would appear to deny claimants that protection.

17. His Government had noted that article 6 of the draft recognized that forum courts should determine on their own initiative that the immunity of the foreign State was respected and he supported the statement in the Commentary to the effect that the provision was "not intended to discourage the court appearance of the contesting State". In the view of his delegation the article and the Commentary struck an appropriate balance likely to contribute to avoiding untoward results.

18. In regard to the non-application of immunity of the State, his delegation believed that the Commission had done excellent work although it shared some of the concerns expresed by other delegations, particularly regarding the treatment accorded to execution after judgement. Those issues needed to be looked at in more detail than was likely to be possible in a diplomatic conference.

19. The draft articles dealt with a topic on which codification would be useful but it was also one on which law and practice were rapidly evolving. His delegation considered that the International Law Commission had not fully caught the trend of change in certain respects and had not given due weight to the important legislation and practice that had developed and was developing. For example, the Commentary contained a number of anachronisms which had not been updated to remove imappropriate references to "exceptions" where the phrase "acts outside the scope of the immunity" would be more accurate.

(Mr. Goldenstock, United States)

20. Where the future work of the International Law Commission on the issue was concerned, he warned against the risks implicit in adopting final decisions on a draft which was not very widely agreed upon. The work performed by the Commission on the issue of jurisdictional immunities was too valuable and the topic too important to risk precipitate action. Thus, among the various possibilities for action he favoured seeking written comments by Governments which would subsequently be considered in a working group as had been suggested by the delegation of Mexico. It would be premature to convene a codification conference, and his delegation would not be prepared to support a proposal to that effect.

21. Mrs. FLORES (Uruguay) said that the draft articles on the jurisdictional immunities of States and their property approved by the International Law Commission would represent a good starting point for the convening of a conference to adopt a convention on the issue. However, her delegation would not object to the creation of a working group within the Sixth Committee to study the matter.

22. Turning to the text of the draft, she considered that the formula used in subparagraph 1 (b) of article 2 to define the meaning of "State" was imprecise.

23. In the relevant paragraph of the Commentary, it had been pointed out that the issue was to "identify those entities or persons entitled to invoke the immunity of the State". In the view of her delegation that could be linked with the draft of the International Law Commission on State responsibility which identified bodies whose acts would be considered as acts of the State and thus capable of generating State responsibility. It was logical to believe that if those were acts of the State, jurisdictional immunity could be invoked in respect of them. In any case, she believed that it would be appropriate to harmonize the provisions of the two drafts.

24. The delegation of Uruguay was of the view that the wording of article 2, paragraph 2 was not sufficiently clear, bearing in mind that the general criteria for determining whether or not a transaction was commercial should be "nature" and the criterion of "purpose" should only apply when the parties had expressly agreed to such use. Even then, the draft provided that the decision as to whether or not a transaction was commercial would rest with the courts of the forum; her delegation inclined to the view that the convention itself should provide for a system which would make the peaceful settlement of the dispute obligatory, with peremptory time-limits.

25. Article 5 of the draft stipulated the basic principle of immunity by adopting a compromise formula between the two opposing arguments, while articles 10 to 17 ennumerated cases in which immunity could not be invoked. Given the dynamic character of the topic and the trend towards the limitation of immunity, provision should be made in the instrument itself for its possible periodic revision.

(Mrs. Flores, Uruguay)

26. In her view, that problem might arise in connection with article 11, paragraph 2 (c) in the context of certain systems of regional integration as it might eliminate legal protection for employees who were neither nationals nor habitual residents of the State of the forum at the time when the contract of employment was concluded.

27. It should not be possible to invoke jurisdictional immunity in the case of transfrontier damage; however, article 12 unjustifiably excluded that situation. According to the arguments used in previous years in favour of the exclusion of such cases, transboundary damage usually gave rise to international disputes which should be settled by reference to international law. In the opinion of her delegation, a single event could give rise to other forms of liability. In a case of transboundary damage, the State could be in breach of its obligations under international law, thus giving rise to international liability; it could also violate the rights of natural or juridical persons, thus giving rise to civil liability.

28. With respect to territorial connections, she noted that although no norm existed under positive international law, both practice and doctrine on that matter tended towards a broad interpretation. That meant that a State could not exercise jurisdiction over matters, persons or things with which it had no contact; however, some form of relationship was sufficient for a State to be able to exercise jurisdiction. In that case, jurisdiction would exist when an incident began in one State and produced effects in another.

29. Draft article 16 did not cover the case of aircraft or space objects; her delegation hoped that any future convention would also include those cases or that the matter would be considered in the context of subseqeuent revision of that convention.

30. Finally, it was the view of her delegation that the convention should envisage a system for the settlement of disputes which would address conflicts that might arise in relation to the commercial or non-commercial nature of a transaction and in relation to the interpretation or application of the instrument.

31. Mr. MANGUEIRA (Angola) said that the topic of jurisdictional immunities of States and their property was a complex and interesting one which had received relatively little theoretical development in international law. While there existed in that regard well-established State practice and general provisions in international conventions, that was not enough to resolve the issue in a comprehensive and practical manner.

32. The draft articles of the International Law Commission reflected a compromise solution between the separate interests of States, which formed a basis for discussion leading to the elaboration and adoption of a future convention. There were controversial points such as the definition or determination of non-State entities which enjoyed immunities and the

(Mr. Mangueira, Angola)

desirability of invoking such immunities. In the opinion of his delegation, paragraph 1 (c) of article 2 was linked to article 1 and what was difficult was to interpret and determine when private entities were entitled to exercise the sovereign authority of the State. That and other similar types of issues depended on the interpretation given to them by the court of the forum.

33. His delegation endorsed the convening of an international conference for the adoption of an international convention on the topic; it would not, however, oppose the creation of a working group to consider the matter.

34. Mr. RODRIGUEZ (Venezuela) said that while the Commission had completed some of the work it had begun and had made progress on other topics, it would have to begin consideration of other subjects which were also fundamental to the progressive development and codification of international law. The establishment of principles of international economic law and the elaboration of rules in that area were priority issues. Also of particular importance was consideration of the legal aspects of the protection of the environment and the issue of the legal status of United Nations resolutions.

35. His delegation had studied with great interest the draft articles on jurisdictional immunities of States and their property, which had been one of the most important topics considered by the Commission in recent years. As had been stated, jurisdictional immunity was used not only in relation to the right of soverign States to exemption from the exercise of power to adjudicate but also in relation to other administrative and executive powers. Jurisdictional immunity was an exception to the rule of the territorial sovereignty of the State of the forum; within the broad meaning intended by the draft article, that jurisdictional immunity guaranteed respect for the sovereignty of the State in the territory of other States.

36. Broadly speaking, his country endorsed the draft articles; it did, however, reserve the right to make substantive comments on each provision at the conference of plenipotentiaries which would adopt a convention on the subject. He supported the convening of the conference: the new international instrument that it adopted would strengthen the codification and progressive development of international law and would complement diplomatic law.

37. Although they undeniably enjoyed immunity, States could not invoke that privilege as a means of not complying with norms of international law or the internal law of the State of the forum. Consequently, there had to be exceptions to the principle of immunity, based on the consent of the State and on international law.

38. With respect to the issue of the settlement of disputes arising from the application or interpretation of the articles on jurisdictional immunities of States and their property, a mechanism should be established based on the consent of the parties to the dispute, rather than on unilateral recourse. Use of that mechanism should be preceded by a phase of direct negotiations

(Mr. Rodriguez, Venezuela)

between the parties which, at a later stage, might refer the matter to a third party, with each step being subject to the express agreement of the States parties to the dispute.

39. Mr. VERENIKIN (Union of Soviet Socialist Republics) said that at its forty-third session, the Commission had made great strides in respect of three topics on its agenda. It had concluded its consideration of the topic, jurisdictional immunities of States and their property, with the approval of the final version of the corresponding draft articles. It had in addition given provisional approval to draft articles on two other topics on its agenda, namely, the draft code of crimes against the peace and security of mankind and the law of the non-navigational uses of international watercourses.

40. The rise in international commercial transactions made it necessary to establish rules of international law relating to the jurisdictional immunity of States and their property in that area. Adoption of a convention on that matter would contribute to the expansion of world trade and to the development of rules to govern international economic relations in an established manner.

41. He stressed that State enterprises with segregated property could not invoke jurisdictional immunity. Furthermore, the State could not be held responsible for the fulfilment of those enterprises' obligations. That concept was recognized under many domestic law systems and in various international instruments, such as the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1978 Protocol to the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface.

42. It had been argued that the jurisdictional immunities of State enterprises should not be eliminated because many of those enterprises did not have sufficient resources to meet their obligations. His delegation believed that such arguments were invalidated by the process of change to a market economy. On 18 October 1991, a treaty of economic cooperation between the Soviet Republics had been signed in Moscow, an event of great significance for the economic recovery of the country. The parties to the treaty recognized that that recovery had to be based on the principles of private ownership, free enterprise and free competition, which would create the necessary conditions for economic recovery. The treaty also limited State intervention in the activities of enterprises. The instrument that had been approved not only established a legal basis for the new economic structure but also provided for various forms of ownership. In addition, on 6 March 1990, a private property act was promulgated in the Soviet Union which, in conjunction with the 1987 act concerning State enterprises, established the concept of segregated State property. By virtue of those laws, immunity from jurisdiction could not be invoked in respect of segregated State property, which was under the control of State enterprises with an independent legal personality, in a proceeding before a foreign court pertaining to the obligations of that enterprise. Jurisdictional immunity could be invoked only in the case where there was intent to attach property as a result of

(Mr. Verenikin, USSR)

non-fulfilment of obligations which rested not with those enterprises but rather with other State enterprises or with the State itself. In that case, the State could invoke jurisdictional immunity, independently of the legal personality to which the property belonged.

43. The Commission had arrived at an acceptable solution in respect of the immunity of State ships engaged in commercial service. Nevertheless, it would not be justifiable to remove from service for long periods of time ships owned or operated by a State (draft article 16). In order to resolve that issue, consideration should be given to the possibility of adopting measures in that regard and including them in a legal instrument.

44. The draft articles on jurisdictional immunities of States and their property contained very precise definitions, which would help create a more just international order under which the commercial activities of States would be subject to the rule of law. In that connection, special consideration should be given to the recommendation of the Commission that an international conference of plenipotentiaries should be convened to consider the draft articles and to agree on a convention on the subject.

45. Mr. RAZAFINDRALAMBO (Madagascar) welcomed the adoption by the Commission of the final version of the draft articles on jurisdictional immunities of States and their property. The draft prepared by the Commission had remained faithful to the initial focus and spirit and represented a compromise between the theories of absolute and restrictive immunity. The Commission had not opted for any of the opposing doctrinal theories, as shown, for example, by the title of part III, which put an end to a long-standing controversy surrounding the question.

46. In draft article 1, the reference to "jurisdiction" had been deleted, which undoubtedly improved the text. Nevertheless, the expression "immunity from jurisdiction" could lend itself to a narrow interpretation which excluded immunity from execution. That would diminish the intended scope of the draft articles, part IV of which dealt with State immunity from measures of constraint.

47. It was helpful that new article 2 combined original articles 2 and 3 provisionally adopted on first reading. The commentary on paragraph 1 (b) (ii), referring to the constituent units of a federal State, indicated that there was no uniform State practice on the question. Hence, it might be appropriate to stipulate that such constituent units would be taken into account only when they performed acts in the exercise of the authority granted to the federal State under the Constitution.

48. Subparagraph (iii), concerning political subdivisions, raised the question of sovereign authority. The use of the plural expression "prérogatives de la puissance publique" in the French text indicated that there were various kinds of authority. Because of its importance, stress was

(Mr. Razafindralambo, Madagascar)

laid on the sovereign authority of the State, since the authority of a mere government agency was limited to the functions which it was called upon to fulfil. Therefore, it should be specified that the authority in question was associated with the State and its attributes, among which was sovereignty.

49. Article 2, paragraph 2, referred to the criteria for determining whether a transaction had a commercial character. In his view, reference should be made primarily to the nature of the contract, and its purpose should be considered only if, in the practice of the State which was a party to the transaction, such purpose was relevant to determining the non-commercial character of the transaction. In response to those who argued that such a system was liable to subjective interpretation, it should be stated that a practice was defined, in principle, by specific elements; thus, the procurement of rice to feed a starving population could not be interpreted subjectively, since it was sufficient to prove that the rice was not intended for commercial speculation and that the population was experiencing a severe food shortage.

50. The major innovation in article 5 was the deletion of the words "and to the relevant rules of general international law". That expression could have given rise to broad interpretations and to an increased number of exceptions to State immunities. The text of the article adopted on first reading had been retained so that it would be acceptable to those advocating the various legal theories on immunity. Article 5 contained only the main principle of immunity, without prejudice to the provisions of the articles specifying the types of proceedings in which State immunity could not be invoked. That same neutral formulation had been used in the title of part III, taking into account the objections raised to the use of the terms "limitations" and "exceptions".

51. Article 6 embodied the obligation of a State to give effect to immunity. The Commission had amended the original text and had simplified it to a large extent by stipulating that the State should ensure that its courts determined on their own initiative that the immunity of another State was respected. Nevertheless, it would be appropriate for that obligation of a State to be formally established by means of domestic legislation defining those cases in which the courts must recognize, on their own initiative, the immunity of a foreign State.

52. In article 7, which dealt with an important exception to immunity, namely, consent to the exercise of jurisdiction, the term "case" had been used for those instances in which specific cases rather than "matters" were involved. Paragraph 2 referred to the agreement granted by a State for the application of the law of another State, which was different from consent to the exercise of jurisdiction. Accordingly, the usefulness of that paragraph was questionable.

53. Madagascar noted with satisfaction the drafting changes made in article 8 concerning the effect of participation in a proceeding before a court.

(Mr. Razafindralambo, Madagascar)

Nevertheless, his delegation viewed as superfluous paragraph 3, which provided that the appearance of a representative of a State before a court of another State as a witness should not be interpreted as consent by the former State.

54. The text of article 9 concerning counter-claims had been significantly improved; it took into consideration the State which instituted the primary proceeding, the State which intervened as a third party and the State which made a counter-claim in a proceeding instituted against it. That formulation considerably facilitated the reading of the text and completed what the Commission described as the trilogy of provisions on the scope of consent.

55. Part III of the draft was of special importance as it referred to proceedings in which State immunity could not be invoked. The general wording of the title offered a solution to the controversy between those favouring "limitations" and those favouring "exceptions" to the principle of immunity.

56. The use of the concept of "commercial transactions" in article 10 had made it consistent with article 2, paragraph 1 (c). Furthermore, the Commission had found a satisfactory solution to the problem of State enterprises; it had not dealt with them in a separate article, but had described them in article 10, paragraph 3, in terms of the commercial transactions which they carried out. In addition, the special nature of State enterprises was broadened to include other entities established by a State which had independent legal personality. Hence the Commission had taken into account the mixed economic systems of many developing countries.

57. The report included surveys of international and national judicial practice which could serve to justify the predominant role which the exception of trading activities played in the theory of restrictive immunity. Nevertheless, the question arose as to whether the survey of practice which was included in the commentary on article 10 was not overly long in comparison with the commentary on the other proceedings dealt with in part III. Furthermore, the Commission appeared to have attached excessive importance to the practice of the industrialized countries and, in particular, of the European countries. In any case, the recent trends towards economic liberalization had aroused special interest in article 10.

58. The Commission had made drafting changes in articles 11 and 12 which had improved the text. Madagascar welcomed the simplification of the text of article 13, concerning ownership, possession and use of property, and of article 15, concerning participation in companies or other collective bodies. The amendments to article 16, concerning ships owned or operated by a State, were also commendable.

59. In his view, the Commission had been able to overcome the dichotomy between "commercial and non-governmental" and "governmental and non-commercial" use. The text adopted by the Commission used the same formula as the 1982 United Nations Convention on the Law of the Sea. Article 16,

(Mr. Razafindralambo, Madagascar)

paragraph 1 referred, at the end, to a ship "used for other than government non-commercial purposes", rather than using the previous formula of "commercial and non-governmental" service. In paragraph 3, the reference to a claim in respect of the consequences of pollution of the marine environment brought the text into line with other instruments dealing with the same issue, particularly the United Nations Convention on the Law of the Sea.

60. The amendments to article 17 concerning the effect of an arbitration agreement reflected the general principles embodied in ad hoc and institutional arbitration agreements.

61. The delegation of Madagascar supported the simplification of the text of part IV, concerning State immunity from measures of constraint. The title of part IV made it clear that what was involved were measures adopted in connection with a proceeding before a court. That clarification appeared to be needed in response to the objection that immunity from execution was in no way associated with immunity from jurisdiction.

62. The Commission had merged into a single article, article 18, the content of article 21, which had dealt with State Immunity from Measures of Constraint, and article 22 concerning consent to such measures. The latter article had become subparagraph (a), and the text of subparagraphs (b) and (c) was a simplification of subparagraphs (b) and (c) of the former article 21. In paragraph 2 of the article, the Commission correctly recalled the principle that consent to the exercise of jurisdiction did not imply consent to the taking of measures of constraint.

63. The text of the two paragraphs of article 19 had also been considerably improved. In the chapeau of the article, the phrase "for other than government non-commercial purposes" had been used in order to avoid using the controversial phrase "for commercial [non-governmental] purposes".

64. Article 20 had also benefited from efforts to simplify and improve. The means of service were given in hierarchical form, the first place on the list providing for procedure under an international convention. The result was highly satisfactory. The same applied to article 21, which set out the conditions for default judgements.

65. Article 22 was the product of a merger between former article 26, which referred to the immunity of a State from measures of coercion, and former article 27 concerning procedural immunities in a court of another State.

66. He then referred to the draft articles on the law of the non-navigational uses of international watercourses and expressed appreciation for the norms and principles on which the draft articles were based, such as the concept of natural resources, the principle of equitable and reasonable utilization and the obligation not to cause appreciable harm to watercourse States. The draft submitted by the Commission was a model international legal instrument,

(Mr. Razafindralambo, Madagascar)

balanced in terms of substance and clear and easily accessible in terms of form.

67. In reference to article 2, it was logical successively to define the terms "international watercourse", "watercourse" and "watercourse State". The term "international watercourse" was essentially defined in subparagraph (a). The criteria contained in subparagraph (b) to define a watercourse were appropriate, since they referred to a system of surface and underground waters constituting a unitary whole and flowing into a common terminus. The definition excluded "confined" groundwater. The suggested provisions appeared to be sufficiently flexible for watercourse States to adapt them to the characteristics of the watercourse crossing their territory.

68. There was nothing in the provisions approved by the Commission which particularly infringed upon the sovereignty of watercourse States. The provisions concerning management (article 26), regulation (article 27) and installations (article 28) took into account the practice of the States, recommendations made by relevant international conferences and existing regulatory conventions.

69. The provisions applicable in time of armed conflict (article 29) reflected the principles and norms of international law that were applicable in such circumstances, particularly the general principle on which the "Martens clause" was based.

70. The principle of non-discrimination embodied in article 32 was based on a general principle contained in bilateral conventions on the protection of the environment. Article 32 seemed perfectly adequate to his delegation, which did not consider it necessary to include a right to compensation or other relief in domestic law.

71. The topic of State responsibility was a particularly complex and difficult issue. His delegation noted with interest the oral presentation made by the Special Rapporteur of his third report and wished to reserve the possibility of making further observations on the issue at the next session of the Committee.

72. Mr. SUY (Belgium), referring to the draft articles on jurisdictional immunities of States and their property, emphasized that international law on the immunity of States was an example of an institution of international law that had evolved solely on the basis of judicial and legislative practice - in other words, the domestic practice of States.

73. His delegation endorsed the approach taken by the Commission in stressing the restrictive theory of jurisdictional immunities of States. In fact, since the end of the nineteenth century, the jurisprudence of the Court of Cassation of Belgium had initiated the evolutionary trend contained in the Commission's draft.

(Mr. Suy, Belgium)

74. Nevertheless, his delegation could not support the contents of the draft articles in their entirety. In connection with the concept of "commercial transaction", the definition contained in article 2, paragraph 2, of the draft represented a compromise between the criterion of the "nature" of the act and the criterion of the "purpose" of the act. His delegation had doubts concerning the advantage of preserving the criterion of "purpose" and would have preferred to have retained the criterion of "nature" as the determining factor. As the United States delegation had emphasized, once the criterion of "purpose" started to be accepted, there was a risk of lapsing into judicial practice detrimental to the principle on which the draft convention was based.

75. As for article 11, concerning contracts of employment, the Commission had taken as a starting point the principle that a State could not invoke immunity from jurisdiction before a court of another State in a proceeding which related to a contract of employment. However, paragraph 2 of the article listed the exceptions to that principle and they were formulated with considerable breadth, particularly subparagraphs (a) and (b). In connection with subparagraph (b), his delegation recognized that the employer State should enjoy a certain autonomy when recruiting members of staff; however, that could lead to problems related to the renewal of the employment contract, particularly in view of the current practice of offering employees or workers repeated short-term contracts since their constant renewal led to serious abuses violating labour legislation, particularly that of Belgium. His delegation therefore maintained its reservations concerning subparagraphs (a) and (b) of article 11, paragraph 2.

76. In connection with State immunity for measures of constraint, his delegation welcomed the fact that the Commission had chosen the second variation suggested in its report: in some cases, there was limited scope for taking measures of constraint against the property of a State.

77. In paragraph 25 of the Commission's report (A/46/10), it was noted that the Commission had decided to recommend to the General Assembly that it convene an international conference of plenipotentiaries to examine the draft articles on the jurisdictional immunities of States and their property and to conclude a convention on the subject. His delegation wished to express its agreement in principle, since that was a normal procedure; however, it wished to point out that over the past 15 years numerous codification conventions drafted at international conferences had not been ratified, which could affect the nature of the norms proclaimed. Caution was needed to ensure that evolving practice was not immobilized by the elaboration of a convention. The delegations of Mexico, Poland and the United States had proposed a provisional solution which consisted in appointing a working group of the Sixth Committee to consider the most appropriate course of action concerning the draft articles, a proposal which his delegation supported in the interests of maintaining the text approved by the Commission.

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78. As for the draft articles on the law of the non-navigational uses of international watercourses, many international treaties had been concluded on the subject but there were very few principles contained in them which were suitable for codification. Every watercourse, and indeed every section of a watercourse, depended on specific geographic, demographic and human factors. The Commission had formulated not principles specific to watercourses but principles of the international law of good-neighbourliness in its widest sense. The draft provided for a series of procedures which could be applied to all transfrontier problems. Apart from the specific situation concerning the utilization of watercourses, it could be applied to all situations in which a State undertook activities in its territory which affected the interests of a neighbouring State.

79. The draft articles should go back to the Commission, and - given the importance of issues relating to the environment and good-neighbourliness - the principle suggested by the Commission could serve as a model for settling all issues relating to international environmental law.

80. With regard to the draft articles on the draft Code of Crimes against the Peace and Security of Mankind, he said that the Code could be applied effectively only if an international judicial body could impose penalties for the violation of the rules laid down in it. That was the position adopted by the Convention on the Prevention and Punishment of the Crime of Genocide, Article VI of which provided that persons charged with genocide should be tried by a competent international penal tribunal. The principle of a universal system of punishment of offences, embodied in various international conventions, was not an ideal solution in the case of international crimes for two reasons: firstly, owing to the opposition which the principle had always provoked since it meant that national courts could pass judgement on the conduct of foreign Governments; and, secondly, because it was logical that an offence against the international order should be tried by a court responsible for upholding that order. The Commission should consider whether it was necessary to draw up a statute for an international criminal jurisdiction.

81. With regard to its future work, the Commission should continue consideration of the priority issues remaining on its agenda. If new issues were to be dealt with in the future, it was for the General Assembly to decide and to instruct the Commission to draw up the relevant drafts.

82. On the question of the list [set out in paragraph 330 of the report (A/46/10)] from which the Commission intended to select topics for inclusion in its long-term programme of work, he agreed with the representative of Poland that some of the topics listed did not by any means fall within the purview of the International Law Commission, but were matters for the Commission on Human Rights, as in the case of the issue of national minorities, or for the United Nations Commission on International Trade Law. Of the topics listed, he had a preference for, firstly, the topic listed in item (e), the legal effects of resolutions of the United Nations - though he

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proposed that the title of the topic should be "Effects of the acts of international organizations" - secondly, for the topic listed in item (1), the legal aspects of disarmament, which should be entitled "Monitoring of the application of international law", a process which should include verification, now a very important institution under international law, although the legal provisions governing it were not widely known, and, lastly, for item (b), extraterritorial application of national legislation, but not as a priority issue.

83. Mr. FERRARI BRAVO (Italy), referring to the draft articles on jurisdictional immunities of States and their property, said that his country had supported the work on that topic from the very outset in accordance with the theory of restrictive immunity. That theory, whose origin was directly linked with the juridical practice of the Italian courts since the beginning of the century, had progressively gained ground, to the point where it was now considered the best response to the needs of the current era.

84. The final conclusions adopted by the Commission on the subject were not fully satisfactory, and the contradiction between the theory of absolute immunity and the theory of restrictive immunity had not yet been overcome. However, in practical terms, the draft adopted by the Commission reflected the legislative and jurisdictional practice established in recent years, where there was a trend towards restricting immunities.

85. The new title of part III of the draft, "Proceedings in which State immunity cannot be invoked", was a clear indication of the limits within which immunity was provided by the articles contained in that part. He therefore welcomed the fact that those provisions had not been labelled "exceptions" to immunity, and would thus not have to be interpreted restrictively.

86. It was desirable that a set of written and universally accepted international rules on the matter should be drawn up in order to help minimize the current tendency to exert pressure on the Ministry of Foreign Affairs of a given State whenever a foreign State was summoned before its courts, with the result that the principle of the division of powers, on which most contemporary legal systems were based, was disregarded.

87. While supporting the theory of restrictive immunity, his Government believed it was important that, where a State enjoyed immunity, that immunity should be acknowledged in the first place by the courts themselves. The modalities for giving effect to State immunity should not be interpreted as an encouragement for summoned States not to appear before the courts. On the contrary, it was advisable to support a rule providing that a summoned State should appear before the courts in order to claim its immunity or, if circumstances so required, to develop its defence on the merits.

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88. With regard to immunity from precautionary measures and measures of constraint, a distinction had to be drawn between the rules concerning the latter and those relating to immunity from cognizance by the courts. Nevertheless, in the exercise of both forms of jurisdiction, especially in the case of executory measures, the problem arose of protecting the rights and interests of individuals vis-à-vis an international legal person enjoying immunity. That was a fundamental principle enshrined in many constitutions and now generally recognized in international law. Essentially, it was a question of harmonizing two rules of international law.

89. His delegation felt that preliminary remarks on the draft should be presented in writing and in detail, and he therefore hoped that the General Assembly would take due time for reflection to enable States to evaluate the draft, before deciding whether to convene an international conference on the subject.

90. With regard to the Commission's programme of work for the forthcoming quinquennium, it was vital that the Commission should not disperse its efforts but should instead concentrate on specific issues.

91. The time had come to complete the codification of the rules on State responsibility. The same applied to the topic of liability for injurious consequences arising out of acts not prohibited by international law.

92. The Commission had enough to do with the items already on its agenda, and it was unrealistic to add others, especially as the Commission ought to be in a position to respond promptly to requests for advice from other institutions which might be engaged in codification tasks.

93. With regard to the list of topics proposed in the Commission's report, he felt that some items should be discarded as it would be difficult to codify them under the current circumstances. Other issues, such as the rights of national minorities, could be better dealt with on a regional basis, at least for the time being. With regard to the law concerning international migrations, further reflection was needed in view of the changes taking place in that area.

94. To date the most appropriate issue for consideration by the Commission was the law of confined international ground waters, which complemented the draft articles on the law of the non-navigational uses of international watercourses. Considering that topic would be an appropriate way of responding to the growing interest in matters relating to the environment.

95. With regard to the two remaining topics on the list, "extradition and judicial assistance" and "international commissions of inquiry", the Commission should draw up a more precise plan of action. Where the latter item was concerned, he commended the Special Committee on the Charter for its excellent work on fact-finding, as a result of which there was perhaps no

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urgency for a global approach to the matter by the Commission. However, the same might not apply to the former item, provided that the goal was simply to compile a list of guidelines to help States in their bilateral and multilateral negotiations.

The meeting rose at 12.40 p.m.